UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GLENN W. GIBBONS,	)	
	)	
Plaintiff	)	
	)	
v.	)	*Civil No. 88-0218 P*
	)	
JAMES H. BURNLEY, IV., Secretary, Department of Transportation, Federal Aviation Administration, United States of America,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This age discrimination in employment case is before the court at this time on the plaintiff's motion for partial summary judgment (on liability only). The motion is supported by the plaintiff's affidavit and a statement of facts submitted pursuant to Local Rule 19(b)(1).[1] The plaintiff was hired by the Federal Aviation Agency ("FAA") as a probationary aviation safety inspector in the airworthiness (maintenance) unit. He reported for work on July 7, 1986, his 65th birthday. In the months following, the FAA learned that during the plaintiff's career as a pilot he had accumulated four Federal Aviation Regulations ("FAR") violations. By notice dated May 14, 1987, the manager of the Portland FAA office advised the plaintiff of his proposal to terminate the plaintiff's employment. Exhibit A to Affidavit of Glenn Gibbons (Docket Item #12). The stated reason for the contemplated action was the manager's

[1] The defendant has not filed a separate statement of material facts pursuant to Local Rule 19(b)(2). As a consequence, all material facts set forth in the plaintiff's statement are deemed admitted. *Id.* Statements 4-5, however, assert conclusions of law and therefore may not be credited.

belief that the plaintiff did not have the credibility and trustworthiness necessary for the performance of his duties. This belief was based on the existence of the four FAR violations not known to the hiring authorities at the time the plaintiff was first employed, the manager's perception that these violations reflected negatively on the plaintiff's personal attitude toward compliance with the FAR and his piloting judgment, and the need to preserve public confidence in the work of the FAA in the area of maintenance safety. *Id.* The plaintiff was terminated less than one month before his probationary period ended.

Utilizing the disparate impact model of proof,[2] the plaintiff asserts that he has established a *prima facie* case of age discrimination in employment, that the defendant has not met its burden of producing evidence of a legitimate business justification for its discriminatory practice, and that therefore he is entitled to summary judgment on liability.[3] He identifies the alleged discriminatory practice as the "termination of a probationary airworthiness inspector who has four FAR violations in his career as a pilot, regardless of how long it took to accumulate these violations." Memorandum in Support of Plaintiff's Motion for Summary Judgment at 6. The plaintiff has presented no statistical or other evidence in support of his claim. Instead, he contends that:

> This is the unusual case where the fact that the practice will tend to impact older workers more adversely than younger workers need not be proved by statistics. It is self-evident that for any given level of skill

[2] In cases brought under Title VII, a plaintiff may proceed under a theory of disparate treatment or disparate impact or both; the former relies on proof of the employer's discriminatory intent or motive and the latter on proof of discriminatory effect due to a facially neutral employment practice. In general, the First Circuit Court of Appeals has applied these and other Title VII standards and theories to age discrimination cases. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011-16 (1st Cir. 1979).

[3] The plaintiff reserves the right to proceed to trial on the disparate treatment model of proof if he is unsuccessful in securing a summary judgment on this motion. Memorandum in Support of Plaintiff's Motion for Summary Judgment at 4.

> or carelessness, an individual would tend to accumulate more citations with more flying time than with less. And there is no need for statistics to show that people with more flying time generally tend to be older than people with less.

Id.

The Supreme Court recently clarified the nature of a plaintiff's burden in establishing a *prima facie* case using the disparate impact model. First, a plaintiff must identify the specific employment practice that is challenged. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2124 (1989) quoting *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. ___; 108 S. Ct. 2777, 2788 (1988). This the plaintiff here has done. A plaintiff then must show statistical disparities substantial enough to raise an inference of causation and produce evidence of the reliability of such statistical evidence. *Watson*, 487 U.S. at ___; 108 S. Ct. at 2788-89 (plurality opinion). *Cf. also id.* at 2792 (Blackmun, J., concurring in part and concurring in judgment). This the plaintiff here has not done. He has failed to present any statistical evidence.[4] Moreover, the foundational premise of his argument --that the practice identified as discriminatory will tend to impact older workers more adversely than younger workers -- is itself untenable. The premise necessarily assumes that over time a licensed pilot will inevitably accumulate FAR violation citations. Nothing in the record supports that assumption, nor is it self-evident as a matter of logic. The present position of the plaintiff's case does not entitle him to summary judgment under Fed. R. Civ. P. 56(c).

I recommend that the plaintiff's motion for partial summary judgment be ***DENIED***.

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[4] The plaintiff asserts that, while the disparity of impact is typically shown by the use of statistics, "this is not a requirement." Memorandum in Support of Plaintiff's Motion for Summary Judgment at 6. In fact, *Watson* and *Wards Cove* permit plaintiffs to show that certain employer *practices*, including the use of subjective criteria, may result in disparate impact, but neither those nor any other Supreme Court decisions change the requirement that the impact itself must be shown through reliable statistical studies.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 1st day of August, 1989.

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David M. Cohen
United States Magistrate